Order 96-6-32

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the **14th day of June, 1996**

SERVED JUNE 20 1996

U.S.-PERU ALL-CARGO SERVICE PROCEEDING — **Docket OST-95-317**

ORDER TO SHOW CAUSE

SUMMARY

By this order, we tentatively award new U.S.-Peru scheduled all-cargo certificate authority and allocate a total of six immediately available weekly frequencies to Arrow Air, Inc. (two weekly frequencies); Florida West International Airlines, Inc. (two weekly frequencies); and Millon Air, Inc. (two weekly frequencies). We have also tentatively decided to defer award of the three weekly frequencies that do not become available until November 1, 1996. We will afford interested parties ten calendar days to comment on our tentative findings and conclusions and seven calendar days for replies.

BACKGROUND

By Order 95-7-14, we instituted this proceeding to select a primary and backup carrier(s) to provide scheduled all-cargo service between the U.S. coterminal points New York, Miami, Houston, and Los Angeles, and the Peru coterminal points Lima and Iquitos, and stated that there were a total of nine weekly frequencies that could be allocated--six that are available immediately and three that become available November 1, 1996. [1]

When this case was instituted, we had four applicants before us for U.S.-Peru all-cargo authority: Arrow in Docket 50131, Challenge in Docket 50138, Fine in Docket 50137, and Millon in Docket 50140. We invited any additional interested carriers to file applications for the authority available, established a procedural schedule, and required that the applicants submit certain information to establish a complete evidentiary record. [2] We stated that the U.S.-Peru authority at issue would be awarded in the form of temporary, experimental certificates of public convenience and necessity under 49 U.S.C. section 41102(c), and that the duration of the authority to be awarded would be for five years for the primary carrier(s) and one year for the backup carrier(s). [3] We also stated that we believed show-cause procedures under Rule 1750 of our regulations (14 CFR 302.1750) were appropriate for processing this case. No party objected to the use of those procedures.

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[1] As set forth in the instituting order, under the 1986 Air Transport Services Agreement between the United States and Peru there are no limits on the number of U.S. carriers that may be designated to provide scheduled all-cargo services. Challenge is the only U.S. carrier currently authorized to provide such services in the market.

[2] We allowed the carriers with existing applications on file to amend their applications if they desired.

[3] See 14 CFR 399.120 of our regulations.

Challenge relied on its existing application; Arrow, Fine, and Millon amended their applications; and Amerijet International, Inc. (Amerijet), DHL Airways, Inc. (DHL), Evergreen International Airlines, Inc. (Evergreen), and Florida West International Airways, Inc. (Florida West), filed new applications. Subsequently, Amerijet, DHL, and Evergreen moved to withdraw their applications. We will grant those motions. All of the five remaining applicants filed direct exhibits.[4] Challenge and Fine filed rebuttal exhibits, and all five applicants submitted briefs. The City of Houston and the Greater Houston Partnership (Houston) filed rebuttal exhibits and a brief.

On October 27, 1995, Fine filed a motion to defer a decision in this case until after the Department acted on Fine's complaint against the Government of Peru pending in Docket OST-95-691. Arrow and Millon filed in opposition to the motion. As discussed below, we will deny Fine's motion.

MARKET PROFILE

According to the Department's T-100 data, for the twelve months ended December 31, 1994, a total of 32,317 tons of cargo was transported between the U.S. and Peru. U.S. carriers transported 20,442 tons (63%), Peruvian carriers transported 8,447 tons (26%), and third-country carriers transported 3,427 tons (11%). The market has grown in recent years, increasing at a compounded annual rate of 16.4% from 1991 through 1994, and for the month of December 1994, it ranked as the 24th largest cargo market in the world. There is a slight directional imbalance in traffic. Northbound cargo was 57.3% of the total and southbound cargo was 42.7%. Northbound traffic consists primarily of perishable/soft goods: agricultural products, clothing, and seafood. Southbound cargo consists largely of durable goods: computers and peripherals, agriculture and oil/gas drilling machinery, and industrial machines and parts.

Miami is by far the largest U.S. gateway, accounting for nearly 90% of the traffic. Los Angeles is the second largest gateway with 7.5% of the traffic, and New York is third with 3.2%. In Peru, Lima annually accounts for over 95% of the traffic.

Challenge, the incumbent U.S. all-cargo carrier in the market, operates 5 weekly flights in the Miami-Lima market with B-757 aircraft. American and United provide belly cargo service on a total of 21 weekly flights in the Miami-Lima market, and Continental recently instituted scheduled combination service in the Newark-Lima market. Aerolineas Argentinas, Aeroperu, Faucett, LACSA, Lan Chile, and Varig provide a total of 30 weekly flights with combination aircraft: 14 from Miami, 12 from Los Angeles, 3 from New York (JFK), and 1 from Newark.

All of the current cargo services by U.S. carriers in the U.S.-Peru market are provided on scheduled services. Peru has permitted only very limited all-cargo charter services. As a result, U.S. carrier participation in the U.S.-Peru cargo market has required an award of scheduled combination or all-cargo authority.

APPLICANT PROPOSALS

We have applications from the incumbent, Challenge, and four new-entrant carriers: Arrow, Fine, Florida West, and Millon. The five applicants seek a total of 20 weekly frequencies: Arrow--3, Challenge--1, Fine--6, Florida West--5, and Millon--5. All of the applicants would use narrow-body equipment and would primarily serve Miami, the largest U.S. gateway. Arrow and

[4] By Notice dated August 17, 1995, we amended the procedural dates for filing direct exhibits, rebuttal exhibits, and briefs.

Florida West would operate from a second U.S. gateway--Houston--each providing a once-weekly southbound flight from Houston. All of the applicants would serve Lima. The four new-entrant applicants would also serve Iquitos--Arrow on 1 of 3 weekly frequencies, Fine on all 6 weekly frequencies, Florida West on 1 weekly southbound flight, and Millon on 2 of 5 weekly frequencies. Florida West's weekly southbound flight would also serve Los Angeles behind Houston, and would serve Santiago, Chile, beyond Lima. See Attachment A for a complete description of the applicants' proposals.

POSITION OF THE PARTIES

a. Applicants

All of the new-entry applicants argue that there is a need for competition with Challenge's monopoly all-cargo service and that granting Challenge any additional frequencies would further enhance its market domination and make it more difficult for new carriers to provide effective competition in the market. Challenge, the incumbent, on the other hand, argues that the public will benefit the most from additional service by the carrier that has developed the all-cargo market to Peru and has demonstrated its commitment to the market, and that the addition of a sixth weekly frequency will further enhance Challenge's express shipment service to Peru by ensuring that shippers never need to wait more than 24 hours for the next outbound flight.

Several of the new-entrant applicants argue that it is important to expand service beyond Miami to other eligible U.S. points. In this regard, Arrow argues that the rebuttal exhibits filed by Houston demonstrate that there is a demand for service in the Houston-Peru market; and Florida West argues that it will best exploit the opportunities available to U.S. carriers by serving the important Miami-Peru market and also expanding service beyond Miami to serve both Houston and Los Angeles, noting that Texas and California ranked second and third, respectively, behind Florida in 1996 export tonnage to Peru. Several carriers also argue that the award of frequencies should go to a carrier(s) with considerable experience operating to South America, thereby ensuring an effective competitive service in the market.

Millon argues that it should be selected because it has had a documented interest in serving since 1991, and that in the interest of fostering healthy competition and providing a wide array of choices for shippers, the Department should award new-entrant carriers authority in the U.S.-Peru market rather than allocating additional frequencies to the entrenched, incumbent carrier. Fine argues that high frequency service by a carrier is necessary to compete effectively with Challenge and also to serve well the northbound traffic that consists largely of perishables. Arrow and Millon argue that Fine should not be allocated frequencies until its problems with the Government of Peru are resolved. Fine and Millon argue that Arrow's re-emergence after being grounded calls into question whether it would be able to dedicate sufficient aircraft for 3 weekly flights, and also argue that in light of Florida West's emergence from Chapter 11 bankruptcy, it should be treated as a new carrier that needs to build a track record before being considered for designation in a limited-entry market.

b. Civic Party

Houston filed rebuttal exhibits, supporting the applications of Arrow and Florida West and arguing that Houston needs cargo service to Peru and the U.S. shipping public needs an alternate U.S. gateway. Houston states that Texas ranked as the second largest state (to Florida) in terms of air cargo shipments to Peru, and that the states for which Houston would be the primary or preferred gateway to Peru accounted for 45% of the air cargo to Peru in 1994, excluding Florida.

TENTATIVE DECISION

We have two discrete groups of frequencies available for allocation: six that are available immediately and three that do not become available until November 1. We have tentatively decided to award the six immediately available allocations now and to defer on our consideration of the November 1 frequencies. Specifically, we have tentatively decided to authorize three of the new-entrant applicants to serve the U.S.-Peru market and to allocate frequencies to them as follows: two frequencies each to Arrow, Florida West, and Millon. [5] Our tentative decision regarding backup authority is described later in the text of this order.

In our instituting order we noted that there are no limits on the number of U.S. carriers that we may authorize to provide scheduled all-cargo services in the U.S.-Peru market and that a significant number of new weekly frequencies were available for allocation. Therefore, in selecting a carrier(s) in this proceeding, we stated that our principal objective would be to maximize the public benefits that will result from awarding this authority. We also stated that we would consider how the applicants' service proposals would improve the overall market structure and the level of competition in the U.S.-Peru market and any other market shown to be relevant, as well as other factors historically used by the Department for carrier selection where they are relevant. [6]

All of the applicants in this proceeding have presented proposals that we believe would benefit the public and shippers in the U.S.-Peru market. Based on our review of the record, we tentatively conclude that awarding the immediately available authority to new-entrant carriers offers the greatest public benefits and best fulfills our goal to increase competitive U.S.-carrier service in the U.S.-Peru all-cargo market. [7]

As noted above, only one U.S. all-cargo carrier, Challenge, serves the U.S.-Peru market, using five weekly frequencies. There has been only extremely limited competition with Challenge's service from all-cargo charter operations because Peru has permitted very few charter services in the market. As a result, entry in the U.S.-Peru cargo market is effectively limited to carriers with scheduled service authority. We stated in Order 95-10-24 that the heavily concentrated nature of U.S.-flag combination service in the U.S.-Peru market has created a strong public need for new entry, price/service options, and competition. [8] U.S.-flag all-cargo service in the U.S.-Peru market is more heavily concentrated than combination service, and we find that the all-cargo market has a similar need for new entry, price/service options, and competition. We tentatively conclude that those needs can best be met by authorizing those new-entrant carriers that are in a position to inaugurate service upon issuance of a final order.

With respect to the three weekly frequencies that become available November 1, 1996, we have tentatively decided not to allocate those frequencies at this time. Given the substantial new U.S. carrier competitive presence we propose to introduce to the U.S.-Peru all-cargo market, we tentatively conclude that the public interest would best be served by waiting until

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[5] Based on data officially noticeable under Rule 24(n), we tentatively find that Arrow and Millon are fit, willing, and able to provide the transportation services authorized. Both of these carriers have previously been found to be citizens of the United States and fit to provide scheduled foreign air transportation of cargo. See, for example, Order 96-2-49 for Arrow and Order 95-8-36 for Millon. The fitness status of Florida West is discussed below in the text of the order.

[6] Order 95-7-14 at 5.

[7] We examined all the carrier's proposals, and while all of the new-entrant applicants' proposals could be said to suffer from certain problems in forecasting techniques and other areas, we believe that they remain basically attainable and not unreasonable.

[8] Order 95-10-24, April 17, 1995, at 6

the new services are in place so that we may review their impact on service and the level of competition in the market before allocating the three remaining frequencies. [9]

With respect to the six frequencies available immediately, our instituting order stated that it was in the public interest that these frequencies be used. In this regard, the order noted that Peru has banned operations by Fine to, from, or over Peru and that Fine has filed a complaint against Peru under U.S.C. section 41310 concerning such action. In that order we concluded that Fine's problems with Peru should not preclude its selection in this case because there were ongoing efforts by the carrier and by both U.S. and Peruvian officials to reach a resolution on this matter through diplomatic channels. Those efforts are still continuing, but without final solution. Fine would thus not be able to inaugurate immediate service at this time and make early use of the valuable rights that are available now for all-cargo services in the U.S.-Peru market. Therefore, since one of our primary goals in this proceeding would be to make full use of the all-cargo rights currently available, we tentatively conclude that we should not award Fine any U.S.-Peru authority at this time.

In turning to the proposals of the remaining three new-entry applicants, we see them as generally equal in terms of service benefits: the aircraft proposed involve narrow-body equipment of comparable size; all would serve Miami, the primary U.S. gateway, and Lima; all would provide service to a second point in Peru--Iquitos; and all are prepared to begin service upon authorization by the Department and Peruvian authorities. While Arrow and Florida West propose some service to Houston, a new U.S. gateway--a benefit we believe warrants their authorization in this case--their proposals involve one weekly southbound flight from Houston (with no return service to Houston), which in our tentative view do not offer a significant advantage over the other applicants to the extent of excluding any of the other applicants from receiving an award in this case. Thus, with none of the new-entrant applicants having a decisive advantage in terms of service benefits, we tentatively conclude that the shipping public will be best served by awarding authority to each of the eligible new-entrant applicants.

Furthermore, we tentatively conclude that awarding three of the new-entrant applicants an allocation of two weekly frequencies, as described above, will provide an opportunity for effective competition with Challenge's existing service and the services of the Peruvian and other foreign carriers in the market. Specifically, under our tentative decision, the new-entrant carriers, Arrow, Florida West, and Millon, would have a total of six weekly frequencies available immediately to offer competitive services. Thus, our tentative decision would make available a substantial increase in the level of competition in the market, one of our primary goals in instituting this proceeding. In addition, it would maximize the carrier/service/rate options to the public and shippers. Further, since all of the carriers propose service from Miami, it would maximize competitive service at the leading U.S. gateway. We believe that these advantages significantly outweigh any benefits that might result from awarding the majority of available frequencies to a single carrier. In this regard, the record of this case does not contain evidence that high frequency service by one carrier is necessary to meet the needs of shippers of perishable northbound cargo, as Fine argues. We believe that four carriers operating a total of 11 weekly frequencies (Challenge with 5, and Arrow, Florida West, and Millon with 2 each) could meet the needs of shippers of all types of cargo, including perishable agriculture products.

While we tentatively find that no applicant's proposal is sufficiently superior to warrant the exclusion of any other applicant, we do recognize that there are strengths to each of the carriers and each of their proposals, and our tentative decision will provide each of the

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[9] We took this same approach in the *U.S.-Brazil All-Cargo Service Proceeding,* Order 95-8-15, August 9, 1995.

applicants an opportunity to bring its strengths to the market. For example, Arrow and Florida West have proposed service from Houston, a new U.S. gateway that Challenge does not serve. Houston has participated in this proceeding and has offered data indicating the benefits of service in the Houston-Peru market. In addition, Arrow and Millon have considerable experience operating to South America and should be able to use that experience to mount effective competition with Challenge's service.

BACKUP AWARD

Since we propose awarding authority to all of the new-entrant applicants now in a position actually to implement the authority, we have tentatively decided not to make backup awards. Should any of the carriers not implement service, we would determine appropriate procedures at that time to make full use of any unused frequencies.

CERTIFICATE CONDITIONS

As we stated in our instituting order, we propose to issue a five-year experimental certificate to each of the new-entry carriers. Consistent with our standard practice, the authority to be awarded will be only for those points specifically proposed for service in the carriers' service plans and will not include all points in the United States or all points in Peru. The frequencies will be allocated to each carrier for a one-year period. Also, we have tentatively decided to include a 60-day start-up provision in any certificate to be issued in this case, and consistent with our standard practice, subject the frequency allocations awarded here to the condition that they will expire automatically and the frequencies will revert back to the Department if they are not used for 90 days (once inaugurated). [10]

The frequencies available for Peru service are extremely valuable and we do not intend that they be wasted. It has been our recent practice to subject frequency allocations in limited entry markets to a 90-day dormancy condition. In addition to the awards we are proposing here, we believe that the dormancy condition is also appropriate for the existing frequency allocations to the incumbent carrier. Therefore, we also propose in this order to subject the current incumbent carrier, Challenge, to the same condition, namely that if a carrier is not using any existing allocated frequencies and those unused frequencies remain dormant for 90 days after the issuance of a final order in this proceeding, the dormancy conditions will apply to such frequencies and they will automatically expire and revert to the Department. Moreover, subsequent lapses of frequency use would also be subject to the 90-day dormancy provision.

Finally, Florida West applied for authority in this proceeding as Florida West International Airways, Inc. (FWIA) and indicated that it had an application pending with the Department to transfer to FWIA the certificate and exemption authority currently held by Florida West Gateway, Inc. d/b/a Florida West Airlines, Inc., which filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in May 1992. A bankruptcy trustee supervises Florida West, and FWIA has been operating with Florida West's trustee maintaining supervisory control over the operations. Since the Department is reviewing the certificate transfer application of FWIA, we tentatively propose to make FWIA's certificate authority in this proceeding subject to the Department's final approval of the certificate transfer application. [11]

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[10] See Orders 96-2-17, 96-3-38, and 96-3-39.

[11] By Order 96-6-19, June 10, 1996, the Department tentatively approved FWIA's certificate transfer application.

ACCORDINGLY,

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, as discussed in the text of this order, to award authority for scheduled all-cargo services in the U.S.-Peru market, as set forth in the table below:

Carrier	Markets	Frequencies[12]
Arrow Air, Inc.	Houston/Miami-Lima/Iquitos	2 weekly
Florida West International Airlines, Inc.	Houston/Miami-Lima/Iquitos-Santiago	2 weekly
Millon Air, Inc.	Miami-Lima/Iquitos	2 weekly

2. We direct any interested parties having objections to our tentative decision in ordering paragraph 1 above to file their objections with the Department's Documentary Services Division, Docket OST-95-317, U.S. Department of Transportation, 400 Seventh Street, S.W., Room PL-401, Washington, D.C. 20590, no later than July 1, 1996; answers thereto shall be filled no later than July 8, 1996; [13]

3. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action; [14]

4. If no objections are filed, we will deem all further procedural steps to have been waived, and proceed to enter a final order subject to Presidential review under 49 U.S.C. 41307;

5. We grant the requests of Amerijet International, Inc., DHL Airways, Inc., and Evergreen International Airlines, Inc., to withdraw their applications in Docket OST-95-317;

6. We deny the motion of Fine Airlines, Inc., to defer a carrier selection decision in Docket OST-95-317; and

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12 Frequencies would be effective immediately upon issuance of a final order.

13 The original submission is to be unbound and without tabs on 8½" x 11" white paper using dark ink (not green).

14 As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration.

7. We shall serve this order on all parties in Docket OST-95-317.

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this order is available on the World Wide Web at http://www.dot.gov/dotinfo/general/orders/aviation.html.